United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-1101

B Pgs.

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

CHARLES [illegible]BERT THOMAS III, et al.,

Appellant

On appeal from a Judgment of the United States District Court for the Eastern District of New York

APPELLANT'S BRIEF

Lynne F. Stewart, Esq.
SIEGEL & GRABER, ESQS.
Attorneys for the Appellant Thomas
100 Church Street — Suite 18
New York, New York 10017
(212) 962-1295

DICK-BAILEY PRINTERS, 28[illegible] Richmond Ave., Staten Island, N.Y. 10302
Telephone: (212) 447-5358

TABLE OF CONTENTS

Table of Cases ii

Preliminary Statement 1

Questions Presented 2

Statement of Facts 3

Argument

POINT ONE
The Defendant's Constitutional right to Due Process of Law was Violated by the Lower Court's Failure to Hold a Limited Evidentiary Hearing on Issues Placed in Contention by His Rule 35 Motion. 6

POINT TWO
The Defendant's Constitutional Right to Due Process of Law was Violated by the Lower Court's Failure to State the Grounds and the Bases Upon Which the Original Sentence was Reconsidered and Denied. 10

POINT THREE
The Judge Abused His Discretion By Imposing a Sentence That Did Not Advance the Primary Penological Goal of Rehabilitation and Denied Appellant an Individualized Sentence. 14

Conclusion 18

TABLE OF CASES

CASES	Page
DONSZYNSKI v UNITED STATES 418 U.S. 424, 94 S. Ct. 3042, 41 L.Ed. 2d 855 (1974)	12
FRANKLIN v SHIELDS ___ F.Supp. ___ 17 Cr. L. 2494(W.D.Va. 1975)	11
FUENTES v SHEVIN 407 U.S. 67, 95 S.Ct. 1983 32 L.Ed. 2d 556(1972)	6
MORRISSEY v BREWER 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972)	6
PELL v PROCUNIER 417 U.S. 817, 94 S.Ct. 2800, 41 L. Ed. 2d 495(1974)	14
SHELTON v UNITED STATES 497 F.2d 156(5 cir.1974)	7
STANLEY v ILLINOIS 405 U.S. 645, 92 S.Ct. 1208 31 L. Ed.2d 551 (1972)	6
TUCKER v UNITED STATES 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed. 2d 592 (1972)	7
UNITED STATES v BATTAGLIA 478 F. 2d 854(5 cir 1974)	8
UNITED STATES v BROWN 479 F. 2d 1170(2 cir. 1973)	10
UNITED STATES v DRISCOLL 496 F.2d 252 (2 cir. 1974)	10
UNITED STATES v FOSS 501 F.2d 522 (1 cir. 1974)	14

UNITED STATES v JOHNSON 7
507 F.2d 826 (7 cir. 1974)

UNITED STATES v MALCOLM 8
432 F. 2d 809 (2 cir. 1970)

UNITED STATES v VELASQUEZ 10
482 F.2d 117 (2 cir. 1973)

UNITED STATES v WESTON 7
448 F. 2d 626 (9 cir. 1971)

UNITED STATES v WOOD WIRE AND METAL LATHERS 11
471 F.2d 408

WILLIAMS v NEW YORK 8,14
337 U.S. 241, 69 S.Ct. 1079
93 L.Ed. 1337 (1949)

LAW REVIEW ARTICLES

Frankel, Lawlessness in Sentencing 7
41 U. Cin L. Rev. 1 (1972)

Rubin, Probation or Prison:...Applying the Principle of the Least Restrictive Alternative 21 Crime and Delinquency 331 (Oct. 1975) 16

Seymour, 1972 Sentencing Study 16
N.Y.S. Bar Journal
4/75 p. 163, 166-7

Singer, Sending Men to Prison: 16
Doctrine of the Least Restrictive
Alternative 58 Cornell L. Rev. 51 (1972)

BOOKS

American Bar Association
Standards Relating to Appellate Review of Sentencing. (1968) 10

Frankel, M. Criminal Sentences
(Hill and Wang, 1972) 10

MISCELANEOUS SOURCES

Hand, Learned Remark, 41 F.R.D.476 17

Levi, Edward Address Federal Bar Council
May 4, 1976 17

Proposed Sentencing Rules, Second Circuit,
Court of Appeals 9,11

PRELIMINARY STATEMENT

Charles Robert Thomas III appeals from a judgement of the United States District Court for the Eastern District of New York (Costantino, M) entered on February 19th, 1976 denying appellant - defendant relief on a Motion to Reduce Sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

Mr. Thomas had pled guilty on September 17th, 1975 to one count of conspiracy to violate 18 U.S.C. §2312 and five substartive counts of violations of 18 U.S.C. §§2313 and 2. (All crimes dealt with the interstate transportation of stolen vehicles). On November 21st, 1975 he was sentenced to three years imprisonment to run concurrently and consideration under 18 U.S.C. §4208 (a) (2).

Subsequently, a Rule 35 Motion was made (December 31st, 1975) and heard (January 2nd, 1976). Decision was reserved until February 19th, 1976, at which time, the motion was denied.

A Motion for bail pending appeal was denied at the time of Mr. Thomas' surrender. It was also denied shortly thereafter by the Second Circuit Court of Appeals (March 16th, 1976). Mr. Thomas is currently serving his sentence at the Metropolitan Correctional Center, New York City.

QUESTIONS PRESENTED

I. Was the defendant's constituional right to due process of law violated by the lower court's failure to hold a limited evidentiary hearing on issues placed in controversey by his Rule 35 motion?

II. Was the defendant's constitutional right to due process of law violated by the lower court's failure to state the grounds upon which the original sentence was reconsidered and left unaltered?

III. Did the Judge abuse his discretion by imposing a sentence that did not advance the primary penological goal of rehabilitation and denied appellant an individualized sentence?

STATEMENT OF FACTS

During the years 1971-1973, Charles Robert Thomas III, a young man in pursuit of the ephemeral "quick-buck", was a member of a criminal group that accomplished the theft and resale of numerous Porsche automobiles. In 1973, after a state conviction involving offenses related and unrelated to this enterprise, he was sent to Rikers Island. He served seven months there and came out a humbled but wiser man. While serving a year's voluntary parole, he left New York C[illegible] scene of his previous wrong-doings, and after a period of adjustment started a seafood and a floor waxing business in the Eastern Long Island town of East Hampton.*

---

* The facts recounted herein are as detailed in the Probation Report. Although requested to be transmitted as part of the Record on this appeal, I am advised that they are confidential and remain within the control of the probation department of the Eastern District of New York Therefore, my references are from personal notes made in Judge Costantino's chambers when the pre-sentence investigation was disclosed for the purpose of the original Rule 35 Motion.

In the spring of 1975, Mr. Thomas surrendered after the opening of a sealed indictment 75 CR. 316 naming him as a co-conspirator in violation of federal law in the Eastern District of New York. He was arraigned, pled not guilty and was released upon a $5,000 personal recognizance bond. In the fall of 1975, after his attorney had received all discovery, he pled guilty to six counts of the indictment. This plea had been his intended course of conduct from the inception of the prosecution (A-8)*.

Appellant Thomas and his wife were duly interviewed by a United States Probation officer. A report was prepared and made availbale by Judge Costantino. On the day of sentencing, after a short recess to enable Thomas' counsel to read that report, (A04-5), certain mitigating factors were brought to the Judges' attention. These included his State incarceration and supervision (A 10-11), his roots in the community, his family responsibilities and other amerliorative factors. Judge Costantino, apparantly listened and gave the defendant a repeated opportunity to speak in his own behalf. Nevertheless in pronouncing sentence seemingly based wholly** upon the facts and conclusions of the pre-sentence report, the Judge reiterated the seriousness of the offense, the defendants alleged profits and role (A - 14 - 16) and

---

*a-8 refers to pagination in Appellant's Appendix
**The only times he had had an opportunity to see and judge the defendant-appellant's demeanor was at the arraignment and the taking of the plea.

sentenced him to a three year (no minimum) term of incarceration.(A17).

Thereafter, a stay of his surrender was ordered until January 5th, 1976. Charles Robert Thomas III retained new counsel and a Rule 35 motion and memo were filed with the Court. (A18-45). Challenged by the motion was the entire probation report - its tone, its gaps and its misinformation. Counsel was heard on January 2nd, 1976. At that time it was indicated that Mr. Thomas wished to present community witnesses in his own behalf to counter-act the statement in the conclusion of the Report that he was a "serious threat to the well-being of any community". (A-27) He also wished to confront and cross-examine those persons, probably law enforcement officials, who characterized him as a "ring-leader" (A-25) and who were responsible for the exaggerated figures of the number of cars with which he was involved and the financial gains he received. (A-25)

Judge Costantino denied the full blown hearing ( ) but on Monday January 5th, 1975, he once again stayed the surrender date until such time as a supplemental probation report could be prepared.

About one month later, this three page memorandum was ready.* It covered three areas. First, it verified the signatures and intent

---

*this supplemental report is also within the control of the United States probation department and therefore could not be made part of the record.

of the petition submitted by Mr. Thomas' friends, neighbors and business acquaintances in his behalf. Second, it detailed several brushes with local police prior to the time of his state incarceration.* Third, the minutes of Mr. Thomas' sentencing by the State Supreme Court were read to discover whether the Justices there mentioned or referred to pending federal charges.** (Once again unconsulted, was Mr. Thomas' state parole officer who supervised him for over a year). The supplemental report, closed with a cryptic note that the defendant did not surrender to the federal authorities until April 24th, 1975 "almost a year later".

On February 19th, 1976, Judge Costantino denied the Rule 35 motion, without explanation, and ordered the oft-delayed surrender of Mr. Thomas. (A-30-31) An application for bail was made. At the hearing on March 1st, 1976, the Judge reiterated his earlier sentencing considerations (A-32) and denied the motion.

---

* 6/73 - Assault - withdrawn 7/73
7/73 - Harrassment - dismissed 8/73

** The memorandum of law submitted in Mr. Thomas' behalf alluded to material in the State Pre-Sentence Report not to the record at sentencing. (A-24).

POINT I

THE DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE LOWER COURT'S FAILURE TO HOLD A LIMITED EVIDENTIARY HEARING ON ISSUES PLACED IN CONTENTION BY HIS RULE 35 MOTION

Procedural due process under the Fifth Amendment of the United States' Constitution has been accorded in recent years to almost everyone who confronts government in any form with something personal to lose. Indeed, the clause has been interposed countless times by the most vulnerable persons in our society and the Courts have recognized their obligation under the Constitution to act as a bulwark in the protection of liberty and property. Fuentes v Shevin 407 U.S. 67, 95 S. Ct. 1983, 32 L. Ed. 2d 556(1972) Stanley v Illinois 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972) Morrissey v Brewer 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)

Although considered an elastic concept, procedural due process is generally conceded to mandate notice and the right to be heard. While the Courts have been zealous in guarding the right of persons to be secure in their property or even "good name", the right of convicted people about to lose the most highly regarded heredíment--liberty--have, at time of sentencing not fared so well. Indeed convicts are involved in a proceeding

which while cloaked in some of the trappings of due process (i.e. own lawyer, open court, allocution) remains a totally discretionary and hence suspect proceeding. Frankel, Lawlessness in Sentencing, 41 U. Cin. L. Rev. 1 (1972)

If the "greatest engine for truth-getting" is cross-examination and confrontation, then, in a situation where there has been a challenge to the factual basis upon which the sentence is to be imposed, a limited evidentiary hearing should be ordered. Shelton v United States 497 F. 2d 156,159 (5 cir. 1974) United States v Johnson 507 F. 2d 826,830 (7 cir. 1974) Tucker v United States 404 U.S. 443, 446 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972)

In the instant case, counsel for Charles Robert Thomas III, requested in the moving papers, under Rule 35 (A-18) and orally, at the January 2, 1976 hearing, the opportunity to present witnesses in mitigation of the harshness of the Probation Report (A) Additionally, the request was made to have some confrontation made of the sources of information as to Mr. Thomas' role in the criminal enterprise and the alleged amounts of his unlawful gains.(A-25) United States v Weston 448 F. 2d 626 (9 cir. 1971) By denying these requests, the District Judge declined

to allow Mr. Thomas the full exercise of his due process rights to a fair hearing.

Williams v New York 337 U.S. 241, 69 S. Ct. 1079, 93 L.Ed. 1337 (1949) has long stood for the proposition that a sentencing hearing should not become a second trial. Williams, decided before the widespread use of plea bargains*, did not involve a defendant who challenged the veracity of the sentencing imputs, but only the right of a Court to use extraneous material at all. It is so distinguished.from this case.

The Second Circuit has not hesitated to exercise its power to review a sentencing where procedures inconsistent with due process are relied upon.

> "Misinformation or misunderstanding that is materially untrue regarding a prior criminal record or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process." (emphasis added)
>
> United States v Malcolm 432 F. 2d 809 (2 cir. 1970)

---

* It is arguable that after a full-blown trial, in which the Judge has heard the evidence of the defendant's wrongdoing first-hand, the sentencing hearing would only be cumulative. However, where the Judge's entire exposure to a person for whom he must assess punishment is the Probation report, a hearing can only serve to remove any lingering doubts of both Court and defendant. United States v Battaglia 478 F. 2d854 (5 cir. 1974)

Furthermore, in the Sentencing Rules tentatively promulgated for Courts under the jurisdiction of the Second Circuit, the Judge at the Pre Sentence Conference is charged with the responsibility, in his discretion, to "establish an appropriate procedure for resolving contested materail factual disputes" Proposed Sentencing Rules III, B, (3)

In the instant case, defendant-appellant Thomas challenged the truth of the information in the Probation Report. By not affording him a hearing, after relying upon the very items challenged as the basis for sentencing (A-54) the Court declined to participate in the search for truth that all criminal proceedings must be.

Wherefore, so that the defendant appellant be afforded the full exercise of his Constitutional rights, we respectfully request that the sentence be vacated and that he be remanded to the District Court.

POINT II

THE DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE LOWER COURT'S FAILURE TO STATE THE GROUNDS AND FACTUAL BASES UPON WHICH THE ORIGINAL SENTENCE WAS RECONSIDERED BUT LEFT UNALTERED.

Charles Robert Thomas III, in his Rule 35 Motion asked for a reconsideration by the sentencing Judge of the custodial sentence. In the course of the two months until a final decision, many papers were submitted, different arguments were made orally, a supplemental probation report was ordered and supplied . The defendant-appellant questioned many aspects of the information the judge may have relied upon. Mr. Thomas presented, and attempted to present, substantial evidence in mitigation. Yet, at the "bottom line", on February 19, 1976, the motion was denied in its entirety. There was no explanation given for the decision nor for the delay. There was only a "Sphinx-like silence". United States v Brown 479 F. 2d 1170, 1173 (2 cir. 1973)

There are extremely salutary effects of a Judge giving a statement of his reasons and designating those portions of the pre-sentence report upon which he relied.*

---

*American Bar Assn. Standards Relating to Appellate Review of Sentences (1968); Frankel, M. Criminal Sentences-Law Without Order 41(Hill and Wang) United States v Driscoll 496 F. 2d 252(2 cir. 1974) United States v Velazquez 482 F. 2d 1170(2 cir.1973)

Aside from beneficent effects, defendant-appellant here asserts that a statement of the basis for the decision is implicit to notions of fundamental fairness and due process under the Fifth Amendment. In another context, The Second Circuit has held that:

> "Due Process requires that the facts upon which judgement is based be made known to the parties. So long as the basis for judgement is availabel to the parties, arbitrary action as well as error can be corrected by the reviewing court."
> United States v Wood, Wire, and Metal Lathers Int. Union, Local No.46 471 F.2d 408 (2 Cir.1973)

It seems clear that if a dispute involving the employment rights of minority workers mandates a factual statement in order to comport with due process; how much more so in the instant case where a man, Charles Robert Thomas is deprived of his liberty, totally, for three years and does not understand the factual basis for the Judge's decision?

Recent case law has decreed that a prisoner is entitled to a statement of reasons when he is rejected by the Parole Board. Franklin v Shields _F. Supp._ 17 Cr.L.2494(W.D. Va. 1975)

Before conviction, a defendant is clearly protected by a full panoply of Constitutional rights. It is only when a person, such as the defendant-appellant finds himself between these two worlds, that his due process rights are in limbo.

One remedy is to mandate, as a minimum, a statement of reasons, a finding of fact. Proposed Sentencing Rules , Second Circuit, 111,C, 2,3. Charles Robert Thomas was deprived of such a statement. This appeal is weakened by that lack.

Due process requires articulation of findings and conclusions. An appellate court cannot and should not presume from a silent record that the most valuable right has been properly terminated. In a recent sharp concurrence, on a related sentencing matter, Justices Marshall, Douglas, Brennan, and Stewart detailled the rationale supporting such statement of reasons at sentencing. Donszynski v United States 418 U.S. 424,454;94 S.Ct. 3042, 41 L.Ed. 2d 855 (1974) Included were the utilization of such on appeal, the contribution to "rationalizing the sentencing process", the usefulness to Correctional Authorities and the aid to defendant and defendant's counsel in assuring themselves that the sentence was not premised on misinformation or inaccuracies.

Wherefore, the defendant-appellant respectfully requests that the sentence be vacated and his case remanded for re-sentencing, with a guarantee of his due process rights to have a meaningful statement of the reasons and bases for any disposition thereafter received.

POINT III

THE JUDGE ABUSED HIS DISCRETION BY IMPOSING A SENTENCE THAT DID NOT ADVANCE THE PRIMARY PENOLOGICAL GOAL OF REHABILITATION AND DENIED APPELLANT AN INDIVIDUALIZED SENTENCE.

> "The punishment should fit the offender and not merely the crime. ...The belief no longer prevails that every offense in a like category calls for an identical punishment without regard to the past life and habits of a particular offender."
> Williams v New York 337 U.S. 241,247: 69 S.Ct.1079, 93L.Ed. 1337 (1949)

> "An important function of the corrections system is the deterrence of crime. The premise is that by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesireable, they and others will be deterred from committing additional criminal offenses."
> Pell v Procunier 417 U.S. 817,94 S.Ct.2800, 41 L.Ed. 2d 495 (1974)

There is such tension between these two antagonistic goals of sentencing that a District Judge's decision can not be lightly made, nor should it be lightly overturned. However, if a Judge, imposes a sentence in a manner which does not take into consideration the ameliorative factors that point away from deterrence, his action may be deemed an abuse of discretion. United States v Foss 501 F.2d 522. (1 Cir. 1974)

Clearly, this was a case with a difference. A man had served State time for the same criminal acts which the Federal Government indicted him a year later. At the time of sentencing, the entire criminal episode was three to five years old. Surely society had been served by the "deterrence" of Charles Robert Thomas' seven months of custodial supervision and one year voluntary parole.

Yet, in all the minutes here submitted, the District Judge seems only to dwell on the crimes committed and the criminal of 1971-1973 who committed them. He appears unwilling to focus upon the flesh and blood person of 1976 who was working so hard to settle down, to make a decent, honest living and to provide emotionally and financially for his family. This lack of focus, which incidentally was also reflected in the Probation Report, denied Charles Robert Thomas proper sentencing consideration, by denying him his individuality in the eyes of the District Judge. That this condition persisted, even after the Rule 35 motion and memo were presented is documented by the fact that the Judge repeated the same considerations (A-54) in March as he had done in November, at the time of the sentencing (A-14) i.e. ("I didn't think there were that many Porsche automobiles in the City of New York to be stolen.")

Besides individualization, which consideration defendant-appellant was clearly entitled to enjoy, we here advance that is was Constitutionally impermissable under the doctrine of the Least Restrictive Alternative to impose a custodial sentence. Under this theory, probation is a presumptive disposition for any non-dangerous offender. Deterrence is considered a myth. Singer, Sending Men to Prison: Constitutional Aspects of the ... Doctrine of the Least Drastic Alternative. 58 Cornell L.R51 (1972); Rubin, Probation or Prison: Applying the Principle of the Least Drastic Alternative, 21 Crime and Delinquincy 331 (Oct. 1975)

Defendant-Appellant Thomas also argues herein that he was prejudiced by sentencing disparities. Studies show that had his crime been committed in the Southern or Northern District of New York he could have expected sentences reduced by 25% and 50% respectively. Seymour, 1972 Sentencing Study... N.Y.S. Bar Journal 4/75,p.163,166-167.

Also, as compared with his co-defendants, he was the only one who received a custodial sentence. William Barth, the alleged ringleader received three years to be served concurrently with a federal sentence already being served.

Mr. Thomas is the only person on the indictment who seemingly derived no consideration for time and supervision already served.(A-25)

Sentencing decisions are onerous, Judge Learned Hand was allegedly heard to mumble on sentencing day:

> "There I am,an old man in a long night gown making muffled noises at people who may be no worse than I." cited at 41 F.R.D. 469,476 (1966)

As human beings we shun inquiry into emotionally laden questions. However, for Charles Robert Thomas, the sentencing decision is immediate and personal. He is the victim of a practice likened to a "lottery" by Attorney General Edward Levi*. Good Faith prospective efforts will not ameliorate the restrictions on Charles Robert Thomas. He respectfully requests that his sentence be vacated and that he be given re-consideration as an individual, upon the theory of the Least Restrictive Alternative.

*Address before the Federal Bar Council, May 4, 1976 New York, New York.

CONCLUSION

The denial of the Rule 35 motion should be reversed, sentence vacated,and the case remanded to the District Court for a new probation report and re-sentencing.

Respectfully yours,

Lynne F. Stewart, Esq.
Siegel & Graber, Esqs.
Attorneys for defendant Thomas
100 Church Street
New York, New York 10007
(212) 962-1295

2226 SIEGEL & GRABER USA v. Thomas

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 18 day of May 197 6 deponent served the within Brief upon:

U.S. Attorney
Eastern District of New York

attorney(s) for

Appellee

in this action, at

225 Cadman Plaza East
Brooklyn, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 18
day of May, 197 6.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977